IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. [redacted] 28

FREMONT CAKE & MEAL COMPANY, a Corporation,
Petitioner,

vs.

WILSON & COMPANY, INC., a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION

J. A. C. Kennedy,
Yale C. Holland,
Louis R. Simpson,
Attorneys for Respondent.

[illegible] — OMAHA LAW-BLANK PRINTING CO. — [illegible]

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IN THE

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OCTOBER TERM, 1950

No. 675

FREMONT CAKE & MEAL COMPANY, a Corporation,
Petitioner,

vs.

WILSON & COMPANY, INC., a Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETTTION

OPINION BELOW

The opinion of the Supreme Court of Nebraska (R. 51-69) is reported at 43 N. W. (2d) 657, 153 Neb. 160.

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on July 24, 1950 (R. 50). A motion for rehearing was overruled on January 13, 1951 (R. 91). The

petition for a writ of certiorari was served on Respondent's counsel on May 12, 1951. Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, Section 1257(3).

REASONS WHY CERTIORARI SHOULD BE DENIED

1. The Federal question sought to be presented is a moot question. The claim that State Courts must enforce the Federal Arbitration Act is not available to a party who has failed to qualify himself to invoke arbitration.

2. Two Federal Courts have held that the Petitioner was not entitled to arbitrate in any event because it had taken none of the steps called for by the arbitration agreement to initiate arbitration, and its course in the matter of arbitration throughout had been dilatory and obstructive. In the face of that finding no Federal question of substance is presented for decision by raising the abstract question as to whether or not State Courts, in States where agreements to arbitrate are not binding, must nevertheless enforce the Federal Arbitration Act.

3. Where the party presently invoking the Federal Arbitration Act took no steps toward arbitration in the first instance, and the other party filed suit in the State Court, which Court found that the party presently seeking arbitration had no legal justification for failing to perform the contract, the finding is the equivalent of a finding that there is nothing to arbitrate. Hence an application to this Court for a writ of certiorari to determine whether or not the State Court erred in refusing to decree specific performance of the arbitration agreement is frivolous and futile and presents no Federal question.

4. The Federal Arbitration Act is a procedural act and relates to remedies only, as distinguished from substantive rights. The provisions of the Federal Arbitration Act being procedural will not be enforced in the Courts of Nebraska where the law is settled that arbitration agreements are not enforceable. The law of the forum controls.

STATEMENT OF THE CASE

On July 11, 1947, Wilson & Company, Inc., filed a suit in the United States Court for the District of Nebraska against Fremont Cake & Meal Company asking damages in the sum of $43,000.00 for breach of contract to supply plaintiff with 36 cars of soybean oil. Fremont filed an application asking the Court to stay the trial until arbitration could be had in accordance with the Federal Arbitration Act, 9 U. S. C. A., Section 3. This motion was sustained. On July 19, 1948, no answer yet having been filed, Wilson & Company, Inc., dismissed the action then pending without prejudice.[1]

The Fremont Company took no steps in the direction of arbitration either before or after the dismissal and on October 29, 1948, Wilson & Company, Inc., brought an action against the Fremont Company in the District Court of Dodge County, Nebraska, on the same cause of action as that brought in the United States District Court.[2]

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1 For history of this original action see **Fremont Cake & Meal Co. v. Wilson & Co., Inc.,** 86 Fed. Supp. 968, and **Fremont Cake & Meal Company vs. Wilson & Company, Inc.,** 183 Fed. (2) 57, 58.

2 See recital of facts in 183 Fed. (2) 57, 58, Column 1; Record, p. 1.

For more than five months thereafter the Fremont Company did nothing in the way of attempting to secure arbitration, and then on April 8, 1949, instituted an action against Wilson & Company, Inc., in the District Court of the United States for the District of Nebraska by the filing of a complaint whose prayer was that—

> "the Court enter an order directing that arbitration proceed between the parties herein in the manner provided for in the contract, Exhibit A, and under the rules of the National Soybean Processors Association, as provided for in the Act of February 12, 1925, in U. S. C. A., Title 9, Section 4."[3]

On June 24, 1949, the Fremont Company filed in the State Court action a "motion for a continuance and to stay further action in this proceeding." The motion was—

> "to continue this action and stay any further proceedings therein until a decision is rendered by Honorable John W. Delehant, District Judge, in an action now pending in the District Court of the United States for the District of Nebraska, Omaha Division, known as 'Fremont Cake & Meal Company, A Corporation, Plaintiff, vs. Wilson & Company, Inc., A Corporation, Defendant, Civil 69-49,"[4]

being the action in which, as above indicated, the Fremont Company had asked for a mandatory order requiring Wilson & Company to proceed with arbitration in accordance with the terms of the contract.

On September 9, 1949, the latter motion was overruled (R. 37, fol. 32).

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3 See recital of facts in **Fremont Cake & Meal Company vs. Wilson & Co.**, 86 Fed. Supp. 968, 970, Column 1; Record, p. 10, fol. 15.

4 Record, p. 8, fol. 13.

On September 13, 1949, the Fremont Company filed another motion for a stay by which motion that company moved the Court—

> "To stay the trial of this action until arbitration can be had in accordance with the provisions and terms of the contract and in the manner provided by the Act of February 12, 1925, U. S. C. A., Title 9, Section 3, and as is provided under the laws of the State of Nebraska." (R. 37, fol. 33.)

On the same date and prior to any ruling on the above motion, the Fremont Company filed its answer in the State Court. This answer is peculiar in form in that Paragraph I reads as follows:

> "Defendant prays the court to stay this proceeding and direct that arbitration be had between the parties in accordance with the requirements of the contract, Act of February 12, 1925, passed by the United States Congress, in U. S. C. A., Title 9, Sec. 3, and the statutes and laws of the State of Nebraska." (R. 5, fol. 9.)

But in the prayer itself defendant simply—

> "Prays that the case be stayed until arbitration proceedings are instituted and completed according to the contract." (R. 7, fol. 11.)

The motion to stay was overruled at the beginning of the trial (R. 95, fol. 10). Counsel for Fremont Company then orally moved the Court to dismiss the action—

> "for the reason that there is no showing that any arbitration proceedings have been held in regard to this controversy in accordance with requirements of the contract and the Statutes of the United States and the laws of the State of Nebraska and the action is premature at this time." (R. 95, fol. 10.)

This motion was likewise overruled (R. 95, fol. 10), and the case proceeded to trial.

Petitioner on page 4 of his petition asserts that large portions of the contract defining the rights and liabilities of the parties were excluded on the ground that there was a reference to arbitration in such portions. No portions of the contract were excluded. Some portions of the *Trading Rules* of the Soybean Association were ruled out on the ground that they were not material, but the only portions of the Trading Rules which were excluded on the ground that they pertained to arbitration were Rules 115 and 116 (R. 186).

The only thing in defendant's motion to dismiss the case that referred to arbitration was the motion that the case be dismissed for the reason that "this contract involves interstate commerce and must be submitted to arbitration in accordance with the requirements of the contract, the Federal statutes, and the State law" (R. 167).

Thus Petitioner's effort in the trial court was to stay the trial until Petitioner could get an order from the Federal Court requiring Wilson & Company to arbitrate. The idea that the State Court should issue such an order was an after-thought.

The trial resulted in a directed verdict for the plaintiff, Wilson & Company, Inc., in the sum of $41,175.00, and judgment was rendered in plaintiff's favor for that amount (R. 44, fols. 42, 43), which judgment was subsequently affirmed by the Supreme Court of Nebraska (R. 51, 52); and 153 Neb. 160, 43 N. W. (2) 657.

Both the State Court case and the Federal Court case were tried on the merits in the trial courts in September of 1949. The Federal Court case was tried to the Court without a jury on September 16, 1949. It was then sub-

mitted on briefs (86 Fed. Supp. 971, Column 2). Trial of the State Court case started on September 19, 1949 (R. 93, fols. 1-3). As stated the judgment of the State District Court was entered on September 24, 1949 (R. 44), and under date of October 8, 1949, Federal Judge Delehant handed down his decision in which he denied the Fremont Company's application for an order to compel arbitration, and held that the Fremont Company had not only taken none of the explicitly defined steps to initiate arbitration, but that "its course in the entire controversy has been dilatory and obstructive only" (86 Fed. Supp. 896; 183 F. (2d) 57, 59). This holding was affirmed by the Circuit Court of Appeals (183 Fed. (2) 57). The affirmance was under date of June 7, 1950. The decision of the District Court of Dodge County, Nebraska, was affirmed by the Supreme Court of Nebraska on July 24, 1950 (153 Neb. 160, 43 N. W. (2) 657).

ARGUMENT

From the above statement it will be seen that both the United States District Court and the Circuit Court of Appeals held that the Fremont Company was not entitled to arbitration in any event because it had taken none of the steps to initiate arbitration called for by the arbitration agreement, and its course in the matter of arbitration throughout had been so dilatory and obstructive that it was not an "aggrieved party," within the meaning of Title 9, U. S. C. A., Section 4. Therefore, when the State Court, on September 9, 1949, overruled Fremont's motion for a continuance of the State Court action "until a decision is rendered by Honorable John W. Delehant, District Judge," it created no Federal question since Judge Delehant held a month later that Fremont was not entitled to arbitration.

Likewise when the State Court Judge, at the start of the trial on September 19 (R. 95), overruled Fremont's motion "to stay the trial of this action until arbitration can be had in accordance with the provisions and terms of the contract and the manner provided by the Act of February 12, 1925, U. S. C. A., Title 9, Section 3," no Federal question was created because it was later definitely and finally adjudicated (86 Fed. Supp. 696, 183 Fed. (2) 57) that Fremont had never qualified itself to invoke arbitration. What difference does it make then that the State Court refused to stay the trial pending the decision of the Federal Court case? Where is the Federal question?

Counsel for the Fremont Company argues that the Federal question is whether the State Court should have entered an affirmative order directing the parties to proceed to arbitration in accordance with the requirements of the contract and pursuant to U. S. C. A., Title 9, Sections 3 and 4. This is an after-thought. The Fremont Company never asked for such an order in the prayer of any pleading that it filed in the trial court or in any oral request made at the trial. It did, in the first paragraph of its answer, filed in the State Court, ask the court to direct the parties to proceed to arbitration pursuant to U. S. C. A., Title 9, Section 3, but it didn't ask for an order of that sort in the prayer of the answer. The prayer was merely that "the case be stayed until arbitration proceedings are instituted and completed according to the contract" (R. 5, fol. 9; R. 7, fol. 11). But it makes no difference whether Fremont Company did or did not in the State Court ask for an order from that court directing the parties to proceed to arbitration under the terms and pursuant to the Federal Arbitration Act. It makes no difference whether in the abstract it is the duty

of a state court to enforce the Federal Arbitration Act or not since, in this case, the Circuit Court of Appeals of the Eighth Circuit has held that by reason of the bad faith of the Fremont Company and its failure to take the necessary preliminary steps toward arbitration that company was not entitled to enforce the arbitration clause of the contract in any event in any court. There was no attempt to procure certiorari in that case and the decision has become final.

This court has said that "the judicial power does not extend to the determination of abstract questions." *Ashwander v. Tennessee Valley*, 297 U. S. 288, 56 S. Ct. 466, 472, 80 L. Ed. 688; *Fremont Cake & Meal Company v. Wilson & Company, Inc.*, 183 Fed. (2) 57, 59, 60.

But, assuming that this Court should ultimately hold that state courts in states which do not enforce arbitration agreements must nevertheless do so where contracts involving interstate commerce are concerned, how could such a decision be of any conceivable benefit to Petitioner in an action already determined by a decision of the Supreme Court of Nebraska? It was almost two years after the breach of the contract before Wilson & Company brought its suit in the state court.[5] During that time the Fremont Company had done nothing in the way of initiating arbitration proceedings, and it did nothing in that respect for more than five months thereafter, when it instituted its suit in the Federal Court to enforce its claimed arbitration rights. It is impossible to reconcile Petitioner's claim that it "tried in every way to get the matter decided by arbitration" (Petition, page 15), with

5 It was in November of 1946 that Fremont notified Wilson that they would not ship the oil at the contract price (R. 117-126).

the findings of the Federal Judge in 86 Fed. Supp. 968, made on October 8, 1949, as follows:

> "It has taken no affirmative action looking to the resolution, by any forum, of its differences with Wilson & Company * * *. Despite the early threats of Wilson & Company in two letters, supra, to invoke the arbitration clause of the contract, it remained silent touching arbitration, and did not itself initiate the process or even assent to Wilson & Company's suggestion of its availability. Wilson & Company then sued in this court. Still, Fremont Company took no steps to commence arbitration. It obtained the ruling announcing the granting of its motion for a stay of the proceedings in that suit, pending arbitration. * * * Even then, with its right to require arbitration vindicated, it remained silent and inert until the first case here had been instituted and pressed for nearly six months, when it started this action." (86 Fed. Supp. 968.)

In the meantime the case had been tried in the State Court in which Court the Fremont Company submitted all the defenses and all the excuses that it could think of to justify its failure to perform the contract. The trial Court ruled that those defenses and excuses were without merit and the State Supreme Court, after a careful review of all of Fremont's contentions came to the same conclusion. Two State Courts have reviewed Petitioner's claims and have arrived at the conclusion that there was no justification for Fremont's default. It is the equivalent of an adjudication that there was nothing to arbitrate, yet Petitioner would have this Court set aside the findings of the State Court and hold that the controversy must be submitted to arbitration, this on the theory that notwithstanding the fact that two Federal Courts have held that Petitioner has failed to qualify itself to invoke arbitration under the Federal Arbitration Act, and two

Nebraska Courts have held that there was nothing to arbitrate, it nevertheless must be given that opportunity.

Petitioner, of course, is under pressure to come up with some reason why justice will be done by discarding the efforts of the Nebraska Courts and relegating this controversy to arbitration. His suggestion is (Petition, pp. 17-19), that arbitraters would be better able to determine the various alleged technical questions involved in the substantive controversy between the parties. The inference apparently sought to be made is that the Courts of Nebraska did not correctly determine those questions. The record of the trial and the comprehensive reviewing opinion of the Supreme Court of Nebraska clearly demonstrate the total lack of merit in Petitioner's suggestion.

Petitioner also argues (Petition, p. 19) that:

> "The State Court even held that defenses because of war and other contingencies could not be considered because the agreement provided for their enforcement by arbitration."[6]

Such defenses were, in fact, considered by the Nebraska Courts, the Supreme Court of Nebraska stating in its opinion in this respect (R. 64) that—

> "The evidence does not show that the Fremont Company was hindered, delayed or prevented by any act of war from processing and delivering the six tanks of soybean oil in question. The evidence does show that Wilson & Company consented to and acquiesced in each delay of delivery without waiving any of its rights under the contract to delivery of the six tank cars of oil in question. No facts existed when the contract in the instant case was made and assumed by the Fremont Company, which made it im-

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6 This statement is incorrect. Arbitration had nothing to do with the ruling out of this defense. (See 43 N. W. (2d) 666, Column 2; R. 64.)

possible of performance." (43 N. W. (2) 666, column 2.)

This Court has no jurisdiction to review the decision of the Supreme Court of Nebraska on the actual substantive controversy between the parties. This Court has consistently held that its power to review State judgments is limited to a determination of the Federal questions involved. *Murdock v. City of Memphis,* 87 U. S. 590 (1874); *Herb v. Pitcairn,* 324 U. S. 17 (1944). The actual substantive controversy between the parties on the contract involved does not present any such question.

It follows from the above that we do not have here the presentation of a Federal question of substance for the consideration of this Honorable Court. Consideration of the question which Petitioner would like to present is barred by the fact that the Circuit Court of Appeals of the Eighth Circuit has said that Petitioner is not entitled to arbitration pursuant to the Federal Act, and the Supreme Court of Nebraska has said, in effect, that even if Petitioner had the technical right to arbitrate there is in this case no area of compromise or field for arbitration. But even if these two insurmountable hurdles did not stand in Petitioner's pathway, still Petitioner has no Federal question of substance for presentation to this Court.

The decision of the Supreme Court of Nebraska appealed from, denying to Petitioner a claimed right to arbitration of the controversy between the parties, was based upon the long established rule of law prevailing in that State that its courts will not enforce arbitration agreements (R. 62-63). The question of arbitration is one of "remedy only," *Marine Transit Corporation v. Dreyfus,* 284 U. S. 263, 277 (1931); *Red Cross Line v. Atlantic Fruit Co.,* 264 U. S. 109 (1923). Matters of rem-

edy are governed by the law of the forum. *Central Vermont Railway Company v. White,* 283 U. S. 507 (1914). It follows that the question of whether or not the courts of the State of Nebraska may deny Petitioner the claimed right of arbitration is to be determined under the law of that state and not under the Federal Arbitration Act.

It is settled beyond doubt that the Federal Arbitration Act is a procedural act and relates to remedies only, as distinguished from substantive rights. This Court so held in the *Marine Transit Corporation* case. Several Circuit Courts of Appeals have likewise held. *Murray Oil Products Comany, Inc., v. Mitsui & Company* (C. C. A. 2, 1944), 146 Fed. (2) 381; *Gatliff Coal Co. v. Cox* (C. C. A. 6, 1944), 142 Fed. (2) 876; *Barry v. Bache,* (C. C. A. 5, 1942), 125 Fed. (2) 493; *Pacific Indemnity Co. v. Insurance Co.* (C. C. A. 9, 1928), 25 Fed. (2) 930; *Fremont Cake & Meal Company v. Wilson & Company, Inc.,* 183 Fed. 57 (C. C. A. 8). The Court of Appeals of New York has similarly construed the New York Arbitration Act.[7] *Berkowitz v. Arbib & Holberg,* 230 N. Y. 261, 132 N. E. 288 (1921).

Petitioner's contention that the Federal Arbitration Act grants to it a right of arbitration which must be enforced by the Courts of Nebraska is not supported by the

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7 The Federal Arbitration Act was generally patterned after the New York Act, **Shanferoke Coal & Supply Company v. Westchester Service Corp.** (C. C. A. 2, 1934), 70 Fed. 2) 297, 298, affirmed 293 U. S. 449. In the **Berkowitz** case, Justice Cardozo, then a member of the New York Court, succinctly stated the nature of arbitration and the law governing same as follows:

> "• • • The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow." (130 N. E. 288, 290.)

cases cited. In *Jackson v. Kentucky River Mills,* 65 Fed. Supp. 601, the observation of the District Court for the District of Kentucky as to "substantive" rights under the Federal Arbitration Act was dictum since the case was decided not on that point, but on the proposition that the judgment in question was void for lack of jurisdiction over the person of the defendant.

In *Wilson & Company, Inc., v. Fremont Cake & Meal Company,* 77 Fed. Supp. 364, which involved the very controversy now before this Court, the United States District Court for the District of Nebraska did not, in fact, make the statement ascribed to it on page 10 of the petition. That statement was merely quoted from another case in the District Court analysis of numerous cases involving arbitration questions (77 Fed. Supp. 364, 376). The District Court in the *Wilson* case,[8] while granting Petitioner the stay requested pending arbitration, specifically stated that the arbitration issue "is one of procedure, not of substantive right" and that respondent had "the absolute choice of forums for the recovery of the damages it claims" (77 Fed. Supp. 364, 379).

Petitioner cites the case of *Red Cross Line v. Atlantic Fruit Co.,* 264 U. S. 109, 123, as showing that this Court has decided that a substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation. This case did not involve the Federal Arbitration Act. It merely decided that the New York Arbitration Act was not in conflict with the exclusive jurisdiction of the admiralty courts. The ref-

8 Respondent voluntarily dismissed this action in the United States District Court for the District of Nebraska and thereafter brought the action appealed from in the District Court of Dodge County, Nebraska.

erence to the substantive right created by an arbitration agreement as being a perfect obligation plainly meant a perfect obligation between the parties in a forum where the remedy of arbitration was available. The very basis for the decision was that arbitration is a matter of remedy to be determined by the law of the forum. This was further expressly recognized in *Marine Transit Corporation v. Dreyfus,* supra, where, in commenting on the *Red Cross Line* decision, this Court stated (284 U. S. 263, 277-278):

> "* * * It was because the question was one of remedy only, that this Court decided that a State, by virtue of the clause saving to suitors 'the right * * * of a common-law remedy,' had the power 'to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the state,' and is contained in a maritime contract made within the state and there to be performed. Red Cross Line v. Atlantic Fruit Company, supra, at page 124 of 264 U. S., 44 S. Ct. 274, 277."

For the same reason, the courts of Nebraska have the inherent authority to determine the remedies of litigants therein and to deny a remedy of arbitration which is contrary to the long established public policy of the State. See *California Prune and Apricot Assoc. v. Catz American Co.* (C. C. A. 9, 1932), 60 Fed. (2) 788, where a Federal Court refused to compel arbitration under the California Arbitration Act.

The cases of *Textile Workers Union of America, C. I. O., v. Aleo Mfg. Co.,* 94 Fed. Supp. 626,[9] and *Shirley-Herman Co. v. International Hod Carriers, etc.,* 182 Fed.

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9 The purported quotation from this case appearing in Footnote 4, page 10 of the Petition is one of the publisher's headnotes.

(2) 806, cited by Petitioner, are clearly distinguishable from any issue here presented. Those cases involved questions under the Labor Management Relations Act of 1927, 29 U. S. C. A., Sec. 185, et seq., whereby Congress created substantive rights in the exercise of its power under the Commerce Clause, and also provided a procedure for the enforcement of those rights.

Arbitration relating to the matter of remedy only, the conclusion is inescapable that the provisions of Section 2 of the Federal Arbitration Act, providing that arbitration agreements shall be valid, irrevocable and enforceable, declares the law of the forum in the Federal Courts only.

The Fremont Company never had any justification for failing to deliver the cars of oil covered by the contract in controversy. It never became interested in arbitration until Wilson & Company had gone to Court with the controversy. It then became interested in arbitration only as a means of stalling off court action. And now that two Federal Courts have found against it, it seeks to postpone the day of accounting by presenting to this Court the abstract question as to whether or not the courts of states which do not enforce arbitration agreements must adopt the procedure of the Federal Arbitration Act in disputes arising under contracts involving interstate commerce. It is not a bona fide presentation of a Federal question. It is simply a final attempt to escape the payment of a just debt.

Respectfully submitted,

J. A. C. Kennedy,
Yale C. Holland,
Louis R. Simpson,
Attorneys for Respondent.